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Legal Dept

A. BRANCH

Subject:— Opinions under the Constitution of India

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C O N T E N T S.

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16(Continued).		entered in the electoral roll can be taken as establishing his claim to Indian citizenship. (Art 326 of the Constitution of India). (Pl. see R.L.A's No. 13998 dt. 31-8-1951).	49-50
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Legal Department.
R.I.No. 20244 dt. 29-9-51.

Submitted.

2. In regard to the buildings occupied by the Posts and Telegraph Department at the Govt. House Estate, Ganeshkhind, Poona, the R.L.A. in his opinion para 5 dated the 26th July 1950 observed thus:

" In respect of these buildings the constitutional position must be taken into account. Under section 172 of the Government of India Act, 1935, if the land and buildings were used for the purposes of the Posts & Telegraph Department prior to 1st April 1937 and if there was no lease in respect of the land and or buildings in favour of Govt. the land or buildings would vest in the Government of India. Similarly they would so vest even if there was a lease provided a certificate was given by the Governor-General that they were retained for future use etc. The P.W.D. must xndx verify and ascertain the correct position. If the land and orbuildings vested in the Central Government under section 172(1)(a) they would continue so to vest by virtue of Article 294(a), of the Constitution, and it would not then be legally feasible for this Government to include them in the lease of the premises demised to the University; for the Government of Bombay would have no title to the land and or buildings."

It appears Government accepted this opinion and excluded thesebuildings and landa from the lease granted to the Poona University and it has been decided that the P.W.D. shouldmake an inquiry in the matter with the Government of India. (Pl. see G.L. E.D.No. U.P.U. 1251-U dated the 30th May 1951). The inquiry has not been so far made and on this case the Secretarty P.W.D. has observed thus :

"The present legal position seems to be that the buildungs still vest in Bombay Government and the Post & t.Deptt. has been occupying them by leave and hence, without payment of rent. The Post Office was for convenkkaience of Govt. House and rent free accommodation could be deemed to have been xx provided by this xx Govt. It is not necessary to declare the site and the buildings as belonging to the Central Govt. in absence of a formal transfer. R.L.A. may see again."

3. Attention of the P.W.D. is invited to R.L.A. s opinion (para 5) dated 26-7-1950 wherein the legal position has been fully explained. The inwuiry suggested therein has not been so far made, nor has been any additional facts been brought on record. There is therefore no reason to reconsider the R.L. A's previous opinion in the matter

If it is desired to fix the limits under article 293 on the powers of the State Government to borrow on the security of the Consolidated Fund of the State and of giving guarantees, it will be necessary to undertake legislation as such limits are to be fixed by law and not by resolution or otherwise.

Sd. J.R.Dhurandhar.
14/4

Remembrancer of Legal Affairs.

U.R. to F.D. No. 18062/ dated the 14th November 1951.

VGP. 25-8-56.

It does not appear that any question of law is involved in this case. It is entirely open to the administration Department concerned to accept the resignation of the applicant as Revenue and Police Patil. His relinquishment of his hereditary office can also be accepted by the Administrative Department. Whether, after such resignation or relinquishment, his nomination as a candidate for the Legislature can be validly accepted or not is not a matter for L.D. or R.D. to decide.

Sd. J.R.Dhurandhar.
20/4

Remembrancer of Legal Affairs.

U.R. to R.D. No. 18591/ dated the 20th November 1951.

VGP. 25-6-56.

23343
12-10-51

Attention is invited to letter from the Government of India, Ministry of Defence, No. 161/4193-D-8/49 dated 10-10-49 addressed to the Secretaries of the Govts. of Bombay, Madras and Bengal , in which it is stated that in view of the recent judgement delivered by the Federal Court (Case no. 29) the Government have decided that all local taxes on the Central Govt. properties should be paid on merits of each case with regard to the points mentioned therein. A copy of the said letter was forwarded to the Municipal Commissioner for the City of Bombay on 2-3-1950. The Assessor and Collector of Bombay Municipality wishes to know whether the Federal Court case no. 20 referred to in the Government of India, Ministry of Defence letter is the same as appeal no V. of 1948 (Corporation of Calcutta) . From the case as reported in F.C.R. Vol. XIp. 368, it appears that the Case No is not 20 of 1949 but V of 1949. It is not Zppeal No. V of 1949 as stated by the Corporation. There may be some other case which is not reported.

Sd.

VGP. 26-6-56.

From the cases as reported in F.C.R.Vol XI page 368, it appears that the case No. is not 20 of 1949 but V of 1949. It is not Appeal No. V of 1949 as stated by the Corporation. There may be some other case which is not reported.

Sd.

Additional Secretary to Government.

U.R. TO L.S.G.&P.H.D.No.18442 dated the 19th Nov. 1951.

Vgp. 26-6-56.

The Madressa at the village Dhabhel in Navsari taluka is situated in S.No.s. 284/1,286,287 and 308. The land is assessed at Rs. 27-9-0; but according to Mantri Mandal Baroda's order No. 122/49 dated the 31st October 1928, a nominal assessment of Rs.1/- only is to be charged and the balance remitted every year so longas the land is used for the Madressa. The Collector of Surat considered this as a typical case and requested orders as to whether the concession should be continued. On a reference to Government in Education Deptt. that Deptt. advised that as the Madrassa is a purely religious specially in view of the secular nature of the Indian Constitution. The Revenue Department for the reasons given in the note of the Addl. under Secretarty dated 4-10-1951 considers that there is no objection to giving effect to Baroda Mantri Mandal's resolution. The Secretary F.D. is however doubtful. He observes:

"The problem is more legal than financial. R.L.A. may be consulted whether a Madressa can be deemed to be an educational institution. If it be an educational institution and is confined mainly to the teaching of religion, I am not sure whether this grant may be continued having regard to Articles 28 and 29 of the Constitution. The point made by R.D. with regard to the decision taken in 1937 can apply only to exemption from payments of land revenue for religious purposes excluding educational institutions, as in the latter case the constitutional provisions will have to be adhered to."

The Chief Secretarty ahs requested R.L.A. to advise on the points raised by the Secy F.D.

2. The points appear to arise from the note of the Secy F.D. They are:-

(1). Whether the Madressa is an educational institution; and

(2) Whether, if the institution in question is confined mainly to the teaching of religion the consession can be continued having regard to Articles 28 and 29 of the Constitution.

3. The question whether an institution is an educational institution is a question of fact. According to Black's Law Dictionary the term 'education' comprehends not merely the instruction received at school or college, but the whole course of training, moral, intellectual

Education may be particularly directed to either the mental, moral or physical powers and faculties, but in its broadcast and best sense it relates to them all. 'Education' is not confined to the improvements and cultivation of the mind, but may consist in the development of one's physical faculties (vide Black's Law Dictionary p.642). 'Madressa' in its literary sense means a college or an academy (see Wilson's Glossery p.496). In the present case, the Madressa is governed by an Act of the Baroda State entitled Dabhel Simlak Act (II of 1941), and under section 18 of the same the Madressa is required to import education both secular and religious though 80 per cent. of the funds are required to be spent on religious instruction. From the Director of Public Instruction's report at p.17, however, it appears that the institution is imparting only religious instruction. Even it be so, the institution would be an educational institution with in the ordinary meaning of that term.

4. The next question for consideration is whether the concession can be continued having regard to Article 28 and 29 of the Constitution. Article 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. The Madressa is not wholly maintained out of State funds. The fact that ist receives some financial assistance from Government will not prevent it from imparting religious instruction. Article 28(3) only provides that no person attending such an educational institution receiving aid out of State funds shall be required to take part in any religious instruction, that may be there imparted without his consent. If no such compulsion is used and admission ti the Madressa is not denied to any citizen on the grounds only of religion, race, caste, language (see Art 29(2)) it will be legally feasible to continue the concession However, whether the concession in the case of an institu

case of an institution of this kind which according to the D.P.I's report gives only religious instruction should be continued or not is a matter of policy for Government to decide.

Sd.

Additional Secretarty to Government.

U.R. to R.D. No. 18155, dated the 15th November 1951.

VGP. 26-6-56.

The Government of India's letter states that there is no objection to an Honourable Minister holding the ex-officio membership of such bodies as Senate/Sysdicate, Court of a University, or Committees or local self governing institutions,etc. It would appear that by the expression "local Self governing institutions" the Government of India probably mean the statutory local bodies, such as municipalities, district local boards etc. It is not clear that the intention of the Government of India also is that the Honourable Ministers should not be associated, excepting in an ex-officio capacity, with non-statutory bodies like the Local Self Government Institute, Bombay Province, and the All India Institute of Local Self Government. It would, therefore be advisable to seek a clarification from the Government of India on this point as to whether their intention also is that the Honourable Ministers should withdraw from institutions of the type mentioned abov

Sd. J.R. Dhurandhar.
23/11

Remembrancer of Legal Affairs.

U.R. to L.S.G.&.P.H.D.No. 18259, dated the 16th Nov. 1951.

VGP. 26-6-56.

No.60/162/50-Ests.,
Government of India.
Ministry of Home Affairs.

From

Shri B.D.Tewari,
Deputy Secretarty to the Government of India.

To

The Secretarty to the Government of Uttar Pradesh,
Appointment (B) Department,
Lucknow.

New Delhi, 2 the 10th October 1950.

Subejct:- Interpretation of Article 234 of the Constitution of India.

Sir,

I am directed to refer to your letter No. G-2343/IIB-283-1944, dated August 1950, on the subject mentioned above, and to reply as follows.

2. It is a settled principle of interpretation - as also a rule of grammar- that a relative clause qualifies the last antecedent unless there is anything in the context which clearly indicates its connection with an earlier antecedent as well (cf. Irrawaddy Flotila Co. V. Bugwandass (1891) 18 L.A. 121, p. 127). That being so the Government of India agree with the view if the Chairman, State Public Service Commission, that consultation with the Public Service Commission and the High Court is required by article 234 only an regard to the making of rules relating to the recruitment to subordinate judiciary. Whether or not the actual recruitment is also to be made in consultation with the High Court as well as the Public Service Commission is left by that article to be laid down in the rules to be made thereunder.

3. The position under section 255 of the Government of India Act 1935 was slightly different. Under that section the Provincial Govt were to make rules, in consultation with the High Courts concerned, prescribing "the standards of qualifications to be attained by persons desirous of entering the subordinate Civil and Judicial services" and the recruitment was left to be made in consultation with the Public Service Commission. In practice, however, these provisions were not found to be uniformly satisfactory. In certain States the recruitment was made by competive examination from among Law Graduates; and the Public Service Commission was obviously the best agency for making the recruitment in such cases. In certain other States however, where recruitment was made from among junior practising Lawyers it was found desirable to associate the High Court also with the actual recruitment. In such cases, where recruitment is made to a judicial office exclusively from among the members of the Bar, most questions of suitablity for appointment must needs present predominantly professional aspects; and for the adjudication of such questions the High Court is obviously the best authority. This has been impliedly conceded by article 233(1). Further as recruitment to subordinate judicial services in many States has in recent years been exclusively made from among the members of the Bar and as public opinion in certain States attaches considerable value to this method of recruitment, it was impossible to re-enact in terms of the provisions of section 255(2) of the Government of India Act, 1935. Article 234 of the Constitution therefore deliberately adopts a different formula and leaves the whole matter (including the standards of qualifications and the procedure of recruitment) to be prescribed by rules

to be made under that article so as to enable every State to frame its rules in conformity with informed public opinion within that State. The Government of India, therefore, consider inmaking actual appointments to the subordinate judiciary, the Governor is not bound by article 234 to consult either the Public Service Commission or the High Court and that he is free to regulate the matter by rules to be made under that article, in any manner deemed fit by him.

4. With reference to the point raised in para 3 of the State Government's letter, I am to say that the provisions of the Constitution requiring Government to consult the public Service Commission or any other authority are merely directory and not mandatory; that is to say any action taken without such consultation is not invalid. For instance on appointment made without prior consultation with the Commssion as required by article 320 is unquestionably valid, although those who omit to comply with the requirements of that article may be answereable to their superiors and ultimately to the Legislature. This principle applies also in relation to article 234. It is unlikely therefore, that any appointment will be challenged in a Court of Law on the ground only that the High Court was not consulted.

5. I am to add that the Government of India consider that the interpretation of article 234 is reasonably clear and that it is hardly necessary to refer the question for the opinion of the Supreme Court under article 243, as sugested at the end of para 3 of your letter.

Yours faithfully,

Sd/-B.D.Tewari,
Deputy Secretarty to the Government of India.

VGP. 26-6-56.

Office of the R.L.A.

Confidential.

The view taken by the Political and Services Department appears to be correct. According to the view taken by the Government of India in their letter of 10th October 1950, article 234 of the Constitution requires consultation with the Public Service Commission and with High Court in regard to the making of rules relating to the recruitment to subordinate judiciary. Whether or not the actual recruitment is to be made in consultation with the High Court as well as the Public Service Commission is left by that article to be laid down in the rules to be made thereunder. The Government of India have also held that provisions in the Constitution requiring Government to consult the Public Service Commission or any other authority are merely directory and not mandatory. It appears from the P.&S.D. note that no notification has been issued by the Governor under article 237 applying the provisions of Chapter VI (which includes article 234) and any rules made thereunder, to any class or classes of magistrates in the State. That being so, the question whether the High Court should be consulted in regard to the making of rules relating to the recruitment of magistrates should be made in consultation with the High Court does not arise. The appointments of the magistrates rests solely in the hands of the Government and if Government wishes to consult the Public Service Commission before making such appointment, it stands to reason that the High Court should supply the confidential records of the magistrates concerned to Government or the Public Service Commission. There is, however, no provision in the Constitution under which the High Court can be compelled to part with those records.

Sd. J.R.Dhurandhar.

L.R. to P.&S.D. No. 276-Confl. dated the 13th March 1951.

Remembrancer of Legal Affairs.

Submitted.

The view taken by the Public Service Commission in paras 2 and 3 of the thier letter dated 10-4-1951 that rules made under article 234 of the Constitution cannot provide for making appointments to the subordinate judicial service of the State without consulting the Commission is based on the assumption that the provisions of article 320 of the Constitution which are of a general nature, of an exception.

Control the rule making power conferred by Article 234 are not in the nature of —

2. This view is not correct. As admitted by the Commission the provisions of article 320 are of general application and apply to all civil services and posts including the sub-ordinate judicial service. Paragraphs (a) and (b) of clause (3) of article 320, inter alia, lay down that the Commission shall be consulted on all matters relating to methods of recruitment, on the principles to be followed in aking appointments and on the suitability of candidates for appointments and ~~xx~~ promotions in civil services. So far as members of the subordinate judicial service are concerned, article 234 and also article 235 contain special provisions regulating their appointments, postings, promotions, grant of leave etc. It is true that article 234 does not, like article 233, expressly provide that appointments shall be made in consultation with any authority other than the Commission. But in article 234 the matter is purposely as pointed out by the Government of India in their letter dated 10-10-1950, left to the rules to be made under the article so that the provision may be flexible and the State Government may make provision for appointment to the subordinate judiciary after consultation with the Commission or

~~the~~ (Contd).

the High Court according to the method of recruitment followed i.e. by competitive examination or recruitment from the Bar.

U.R. to H.D. No. 649-Confl dated the 5th July 1951.

VGP. 26-6-56.

There is the well recognised legal maxim "Generalia specialibus non derogant." Where a general intention is expressed and also a particular intention which is compatible with the general one, the particular intention is considered an exemption to the general one (p.176 of Maxwell on Interpretation of Statutes, 9th Edition). Hence general provisions in a Statute are not to be taken as controlling or repealing the special provisions; the latter is to be treated as an exception. Accordingly the question of appointments to subordinate judiciary will have to be determined solely under the provisions of article 234 which contains special provisions on the subject and article 320 has no application to such cases and any rules made under article 234 will not be void merely on the ground that they are inconsistent with the provisions of article 320 (cf. R.L.A's opinion No. 276-confl. dated 13-3-1951.).

2. The view taken by the Commission in paragraph 1 of their letter that unless rules are actually made under article 234 which provides for a procedure which excludes the Commission in making appointments to the subordinate judiciary, the general obligation to make the appointments in consultation with the Commission is not affected, is also not correct. As stated above Article 234 is a special provision and therefore if no rules are made by the Governor under that Article regulating how appointments shall be made by him he is free to make the appointments in any way he likes. The absence of such rules does not make that Article subject to the provisions of Article 320. In view of the position stated above it is not necessary to review the position as suggested by the Commission.

Sd. J.R. Dhurandhar.
4/7

Remembrancer of Legal Affairs.

U.F. to H.D. No. 649-Confl dated the 5th July 1951.

The case of Presidency Magistrate is distinct from that of District Judges or other members of the judicial service. In their case the provisions of Chapter VI in Part VIX of the Constitution and any rules made thereunder are not applicable until the necessary notification is issued by the Governor under article 237 but as long as such notification is not issued by the Governor the general provisions of article 320 shall operate and it will be necessary to consult the Public Service Commission ~~xxxxxxxxxx xxxxxxxxxx~~ before making their appointments. Consultation with the High Court in the matter of such appointments is neither obligatory nor precluded under the Constitution. Whether in addition to the Public Service Commission Government should also consult the High Court is a matter of policy for Government to decide.

Sd. J.R.Dhurandhar.
17/7

Remembrancer of Legal Affairs.

U.R. to H.D.No. 694/Confl. dated the 17th July 1951

VGP. 26-6-56.

R.I.No. 22946 dt. 8-11-51.

Submitted.

2. Under G.R. , E.D.No. S.C.H. 7850 dated the 9th July 1951, as modified by G.R.E.D. No. 7850, dated the 2 8th August 1951 Govt. has sanctioned the grant of 15 loan scholarships of the value of Rs. 700 per annum each to poor deserving students studying for degree examinations in the Engineering Colleges of the State, subject to ertain conditions. The ques tion for consideration of the R.L.A. is whether ~~kk~~ it would be feasible to restrict the grant of the scho larships to students of this State only.

3. Attention of the E.D. is invited to R.L.A.'s opinion No. 2279, dated the 6th February 1951 wherein the point raised in this file has been considered. As stated therein in view of Article 15(1) of the Constitution it would not be feasible to restrict the grant of scholarship to students of the domicile of this State only.

The Supreme Court decision in State of Madras v. Champak Nayan Dorairajan XIV S.C.J. 1951; p. 313 would not alter the view taken in the said opinion.

Sd.

VGP. 26-6-56.

Charges for agency functions of the Union Government. Constitution of India Art. 258(3).

Article 258 sub-section (1) deals with the entrustment by the President to the State Government or its officers functions in relations to any matter to which the executive power of the Union extends with the consent of the State Government. Sub-section (3) thereof provides that when such powers and duties have been conferred or imposed under this Article there shall be paid by the Government of India to the State, such sum as may be agreed or in default of agreement as may be determined by an arbitrator appointed by the Chief Justice of India in respect of any extra costs of administration incurred by the State in connection with the exercise of those powers and duties. It is clear from this provision that that the Government of India is liable to the State Govt exorcising the agency functions of the Union under this Article is only the extra costs of administration incurred by the State Government in connection with such functions In the Revenue Department letter dated the 24th October 1950, what is claimed in addition to the contingent expenditure, cost of special establishment employed by this Government etc. is the establishment charges at a percentage ranging from Rs. 1/- to 5/- based on the total amount of compensation awarded in that particular land acquisition proceedings. Unless the Government of India agrees a claim on percentage basis cannot be sustained on the strict terms of Art. 258(3)

It may be pointed out that Article 258(3) of the Constitution closely follows the wording of sub.section (3) of section 124 of the Government of India Act, 1935 From the P.&.S.D. letter No. 1809/34-A dated the 5th March 1949 page 23 (para 9) it appears that under the arrangement existing prior to the Constitution for similar functions where the land was acquired for the Federal Government, the Provincial Government was to be re-embursed the cost of extra-establishment, if any, as was entertained, in addition to the contingent charges. sd R.L.A.

U.R. to R.D. No. 19810 D/ 15 Dec. 1951

Domicile & Upper-age limit - relaxation of conditions of --

ADVANCE COPY.

Government of Bombay.
Education Department,
Resolution No. DPE. 1051,
Bombay Castle, 3rd December, 1951.

Letter from the Surgeon General with the Government of Bombay No. S.1/97204/PWR, dated the 12th March 1951.

Resolution: Under orders issued in Government Resolution, Education and Industries Department, No. 7037 dated the 23rd October 1947, Government has relaxed the condition of domicile in favour of non-muslim displaced students from Western Pakistan in connection with their admission to Government or Government aided Educational institutions in this State and has extended this concession further for the years 1948-50 and 1950-51 under Government Resolution, Education and Industrion Department No. 70-37, dated the 29th October 1948 and Government Resolution, Education Department No.7037, dated the 31st May 1950 respectively. The question whether the period of this concession should be further extended for the year 1951-52 was under the active consideration of Government.

2. So faras the question of domicile in respect of the displaced students is concerned, the Constitution recognises merely Indian Domicile. It does not recognise any State Domicile. The question of the Bombay State Domicile does not therefore, arise in the case of all those displaced persons who have acquired citizenship of India under Article 6 of the Constitution, as they would be deemed to have been domiciled in India. Government is therefore pleased to direct that all these displaced students, whether muslim or non-muslim who have become citizens of India under the Constitution , should be admitted to the Government or Government aided institutions in this State and the question of relaxation of the condition of Domicile does not, therefore arise in their respect.

3. The Government had further granted the concession of relaxing the upper age limit in favour of non-muslim displaced students from Western Pakistan for the purposes of their admission to Govt or Government aided Educational institutions in the State of Bombay, under Government Resolution., Education and Industries Department No. 8330, dated 11th June 1948 and has continued it for the year 1949-50 and 1950-51 under Government Resolution Education and Industries Department No. 8330, dated the 29th Oct. 1948 and Government Resolution, Education Department No. 7037, dated the 31st May 1950 respectively. The Government is pleased to direct that the concession granted for relaxation of upper age limit as stated above should ve, continued for the year 1951 1952 in the case of all displaced students, whether muslims or non- muslims.

4. The Heads of Departments concerned should be requested to communicate these orders to all Government aided Educational Institutions under their control.

By order of the Governor of Bombay

Sd.
B.B.Samant.
Under Secretaryk to Government.

To The Director of Education,
The Surgeon General, with the Government of Bombay,

(To ..

The Dean Sir, J.J. School of Art,
The Director of Tecnical Education,
The Director, Backward Class Welfare,
The Chief Inspector of Certified Schools,
The Director of Agriculture,
The Director of Animal Husbandry and Veterinary Sciences,
The Chief Conservator of Forests,
The Accountant General, Bombay (through the Finance Dtment).
The Finance Department.
The Political and Services Department
The Local Self Government and Public Health Department.
The Agriculture and Forests Department.
The Rehabilitation Department,
The Legal Department,
All other departments of the Secretariat (except Separate Department and the Civil Supplies Department),
All other heads of departments under the Several Departments of the Secretariat,
The Chief Secretary to the Government of the United States of Saurashtra.
The Secretary to the Government of India, Ministry of Education, and Rehabilitation.)

by letter.

VGP. 26-6-56.

Submitted.

Pl. see the note of the Passport Officer dated 13.12.1951 at p.17 ante. Mr.David Menashy, who was born in Baghdad in April 1931, came to India with his step-father in December 1941 and has been residing here since then. On 25.1.1950 he applied and obtained a domicile certificate from the Chief Presidency Magistrate and he has now applied for an Indian Passport. The Passport Officer has found that till August 1951, the applicant was holding a passport which was granted to him by the Iraq Consulate in Bombay and in view of these circumstances, L.D. is requested to advise whether the applicant can be deemed to be a citizen of India under Part II of the Constitution.

2. As Mr. Menashy had retained his Iraqi passport till Augutst 1950 he must be deemed to have chosen to remain an Iraqi, national after coming into force of the Constitution, where-under he could have obtained Indian nationality. Consequently his case falls under Art 9 and he cannot be deemed to be an Indian Citizen (Vide R.L.A's opinion No. 16742 dt, the 22nd Oct. 1951).

VGP. 26-C-56.

Indian Citizenship.

Constitution of India. Arts 5 & 9.

The view taken by the Passport Officer is not correct. In 1947 when Mr. Menashy obtained an Iraqi passport there was no such thing as Indian citizenship. The mere fact that his Iraqi passport has not been cancelled would not be held as showing that he has voluntarily acquired Iraqi nationality within the meaning of Art 9 of the Constitution. Mr. Menashy has been staying in India 1941 and has in 1950 obtained a domicile certificate. He must be deemed to be an Indian Citizen.

Sd. J.R.Dhurandhar.
24/12

Remembrancer of Legal Affairs.

U.R. to Passport Office No. 20515, dated the 24th December 1951.

VCP. 26-6-56.

The Revenue Department appears to be labouring under the misapprehension that the fact that the Requisitioned Land (Continuance of Powers) Ordinance 1946, was applied to the partially excluded areas would make also the Requisitioned Land (Continuance of Powers) Act 1947, applicable to these areas. The Ordinance has already been repealed. To apply the Requisitioned Land (Continuance of Powers) Act, 1947 to these areas, it was necessary to issue a separate notification under section 92 of the Government of India Act, 1935. As no such notification was issued the Act of 1947 is not in force in these areas. It is true that by virtue of the provisions of paragraph 5 of Part B of the Fifth Schedule to the Constitution the Requisitioned Land (Continuance of Powers) (Bombay Amendment) Act, 1951, will apply automatically to the scheduled areas without any modification. But as the principal excluded areas the automatic application of the Amending Act of 1951 to these areas will not be useful and the Amending Act will remain inoperative in these areas. This position may be borne in mind by the Department while enforcing the provisions of the Act of 1947 read with the Act of 1951.

Act of 1947 is not in force in the former partially

Sd. J.R.Dhurandhar.
4/12

Remembrancer of Legal Affairs.

U.R. to R.D. No. 19465, dated the 4th December 1951.

VGP. 26-6-56.

The legal position regarding the State Judicial Service consisting of the District Judges, who are not members of the Indian Civil Service, is as stated in Secretary, H.D.'s note dated 28-5-1951 at pp.14-15 ante There is now no provision in the Constitution corresponding to section 244 or section 246 of the Government of India Act, 1935 before it was adapted, providing for determination of the strength of the services recruited by the Secretary of State or for specifying the reserved posts to be filled by persons ~~thxx~~ appointed by the Secretary of State Under article 233 of the Constitution appointments of district judges can be made by the Governor in consultation with the High Court. Subject to the special provision contained in this article 233 regarding the appointment of district judges, the other conditions of service including the strength of the service can be regulated by law or rules made under article 309 read with entry 41 in List II in the Seventh Schedule to the Constitution. Subject to the provision of article 233 which lays down the manner of appointment to the posts of district judges and the provisions of article 314 which gurantees the same conditions of service as respects remuneration, leave and pension and same rights as respects disciplinary matters and similar rights to the members of the Indian Civil Service appointed to the posts, the State Government is competent to make the necessary law or rules governing the conditions of service of the district judges.

Sd. J.R.Dhurandhar.
5/12

Remembrancer of Legal Affairs.

U.R. to H.D.No. 19546, dated the 5th December 1951.

VGP. 26-6-56.

In this case the Times of India challenges the legality of the orders of Government in requiring the Illustrated Weekly to pay a tax at the rate of 30 %. It appears from their letter dated 1st December 1951 that their contention is that the said rate is discriminating and offends against the guarantee of equality under article 14 of the Constitution. They, therefore suggest that Government should levy the tax at a uniform rate of 25 % from all newspaper which conduct crossword prize competitions. If this question is taken to a court of law, the probablities are that the validity of section 12 of the Bombay Lotteries and Prize Competition Control and tax act, 1948 might be called in question. Both the provisions of section 12(1)(b) as well as section 12(2) empower Government to levy the tax at a maximum rate. It is left to the discretion of Government to fix the actual rate. It is true that equality does not mean that there must be a uniformity of taxation. There may be circumstances which may justify classification. But such classification must be on a reasonable basis and must not be arbitrary (Willis on Constitutional Law p. 587). It is true that as pointed out in H.D. notes that it is the policy of Government to scrutinize the financial position of all the competitions licensed in the State and prescribe a higher rate of tax for those competitions which make the profits at the cost of credulous competitors. But both section 12 (1) (b) as well as section 12(2) do not give any indication regarding this policy or contain any indication which may guide the exercise of discretion by the State Government. It will, therefore, be desirable to amend section 12 in such a manner as would embody such indication. Until that is done, it would

would be desirable not to allow the matter to go to a court of law. Section 12 being a taxing provision the courts will be inclined to construe as much as possible in favour of the subject.

Sd. J.R.Dhurandhar.
17/12.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 20178, dated the 18th December 1951.

VGP. 26-6-56.

Submitted,

The facts of this case are as follows: Mr. Shemail Kohen, who was born in Afghanistan and is a Jew by religion, appears to have come to India, in 1948 from Enemc Pakistan on a limited Visa for 6 months' stay but has been residing here since then under extension granted to him from time to time. Prior to his arrival here he was, it appears, registered at Peshwar on 3-6-19-43 under the Registration of Foreigners Rules 1939. His parents, sisters and brothers are in Israel and the C of P. considers that in view of all these facts he cannot be considered to be an Indian Citizen. As Mr. Kohen was a foreigner, he was asked to leave India before the 15th October 1951 (vide p. 69 ante). He is, however, not prepared to obey this order and he contends that he is an Indian Citizen as he came to India in 1940 and has been residing here since then. He has also obtained a domicile certificate from the Chief Presidency Magistrate on 25-1-1950 and he further contends that as his claim for inclusion of his name in the Electoral roll was accepted by the Court of Small Causes, he should be considered to be an Indian. On the Basis of these facts, Mr. Kohen represented to Govt. of India that he should be recognised as a citizen of India and that Govt. has referred the matter to Govt. of Bombay for their views in the matter. The papers are referred to the R.L.A. for advice as to whether the fact that the Small Causes Court has ordered that Mr. Kohen's name be entered in the electoral roll can be taken as esyablishing his claim to Indian citizenship. (vide p. 159 ante).

2. A similar point has beenn considered by the R.L.A. in his opinion No. 13998 dated the 31st August 1951 in the case of Sayed Mustafa, R.L.A . therein observed:

> "It is true that Shri Sayed Mustafa has been entered as voter in the electoral roll and article 326 of the Constitution contemplate that only citizens of India would be entieled to suffrage. Shri Sayed Mustafa may, therefore , argue that his entry as a voter in the electoral roll presupposes that he is a citizen of India. But the mere entry of a person in the electoral (cont'd)

roll is not a conclusive proof that he is a citizen, as such entry merely entitles him to the suffrage and not to any other rights incidental to the citizenship."

In the present case, it is true that the Mr. Kohen has been registered in the electoral roll; but if the contention of the Police that he came to India in 1948 be correct, that entry can be of no use to Mr. Kohen to prove his citizenship.

3. Attention of P.&.S.D. is invited to R.L.A.'s opinion No. 13998, dated 31-8-1951.

VGP. 26-6-56.

W.R. to P.&.S.D. No. 20578 of 27-12-57.

On 28th June 1920 an agreement was entered into with the Belapur Company on the one hand and the Government of Bombay on the other in accordance with the terms of which Government leased certain lands in the District of Ahmednagar and agreed to give water supply on certain conditon . The Lease is in P.W.D. File "Belapur Company" and is shipped 'L' The material conditions of the lease are, so far as concerned, contained in clauses 3, 11 and 12(f). Clause 3 this case is provides that the maximum period pf the lease was to be 99 years, the period being renewable every 30 years from 1st April 1920, The said clause provides that the lands were leased at a fixed rental viz. (1) ten times the current annual agricultural assessment for land on which sugar cane can be cultivated, and (2) three times the assessment on other land. The rent so fixed is liable to revision at each renewal so that it shall represent the same multiple of the revised annual assessment in the neighbourhood. Under clause 11 Government has guaranteed to the Company sufficient supply of water at Rs.45 per acre of land which gets perennial supply of water and at Rs 8/- per acre for other lands. Government is however given the right to increase the rate at each renewal to the same rate as is charged to outside cultivators in the neighbourhood. Clause 12(f) provides that Government may acquire the land for public purpose or may resume the same by giving six month notice, but the compensation payable to the Company would be the then value of the buildings etc erected on the land.

2. The Gokak leases shipped B are dated 31 st July 1894 and 20th August 1897.

A mere amendment of section 44 of the Bombay Irrigation Act, 1879, as suggested by P.W.D. will not be sufficient. Item No. 17 "Water including water supplies" is in the State List (List II in the Seventh Schedule to the Constitution). Under item No. 66 in the same List fees in respect of water can be charged. It is therefore open to the State Legislature to legislate as regards the rates for the supply of water.

5. But the real question would be whether in such legislation power can be taken to over-ride the provisions of the agreements. Under Article 294 of the Constitution the agreements entered into by former Government are binding on the present Government. It is true that such binding cannot be for all times and such agreements would be subject to the power of legislation which a State Legislature is competent to enact. It would, therefore,, be open to the State Legislature to enact a law setting aside the agreements or any particular provision or rental therein. In doing so, the provisions of the Constitution particularly those relating to fundamental rights in Part III will have to be borne in mind. Article 19(1)(f) guarantees the subject a right to acquire, hold and dispose of property. Clause (5) of the Article provides that the right can be restricted in the general public interest, but such restriction must be reasonable. According to the decisions of the High Courts as well as of the Supreme Court, it would be for the Courts to decide whether the restrictions are reasonable. It, therefore, the lessees are made liable to pay water rate at a higher rate or by a different method, they will be entitled to compensation, and such compensation will have to be reasonable in the circumstances of the case. Moreover, the right to have the supply of water in their cases would, in accordance with the view taken by the Supreme Court, be property within the meaning of Article 31(2) Charanjit Lal v. Union of India,

of the lease is 99 years from 25th May 1884. The
The period yearly rent for the land leased is Rs. 273-5-0
and for the exclusive use of water the leassee agrees to pay
Government Rs. 345-0/- annually. By the supplementary agree-
ment of 1898 the Gokak Company has agreed to pay additional
rent for land and water.

3. The P.W.D. considers that both the above leases are unfavourable to Government and the concessions given are out of proportion in relation to the benefits given to other persons. The proposal therefore is that Government should terminate the above leases by an amendment of section 44 of the Bombay Irriga-tion Act, 1879, by taking power to increase the rates fixed for the supply of water. The second question which is raised is whether Government will be bound to make provision for the payment of compensation in the proposed legislation.

4. In the first place both the Belapur and Gokak agreements do not appear to have been entered into under the provisions of the Bombay Irrigation Act. The Bombay Irrigation Act, 1879 contains such provisions as section 27 in accordance with which water from a cahal can be supplied. It is true that in the Bela-pur case water is being supplied from a canal. But in the Gokak case it does not appear to be so. The Gokak Company has been given a right to usewater from the Ghataprabha river. Under sec-tion 5 of the Bombay Irrigation Act, in the case of a river or a ~~tm~~ stream flowing in a natural channel Government may by noti-fication declare that the water of such river or stream can be applied for the purpose of a canal. It is not known whether any such notification has been issued in regard to the Ghataprabha river at Gokak. But both the agreements appear to be agreement and appear to be outside the purview of the Bomby Irrigation Act In the case of the Belapur agreement this was the view held by the R.L.A. as well as the Advocate General (see R.L.A's opinion No. 589 dated 29th March 1922 and Advocate General's opinion No. 81 dated 26th November 1929). A mere amendment of section 44 of the Bombay.

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of water in their cases would, in accordance with the view taken by
the Supreme Court, by property within the meaning of Article 31(2)
Charanjitlal v. Union of India, (1951) S.J.J. 29 at p. 51), and
the deprivation would not be legal until compensation is provided
for, It is true that under clause (5) of Art 31 in the case of
taxation the provisions of lclause (2) do not apply. The analogy of
land revenue is not relevant. But water rates are not taxes levieb

taxes ~~xix~~ leviable by the State Legisl ature, but are only fees According to the ordinary principles of law the Courts will hold that compensation or damages should be reasonable and not illusory and the measure of compensation or damages ~~xxxxxxxxxxxxx~~ would be held to be the additional amount which the lessees would have to pay during the currency of the lease in consequence of the legis - lative enactment.

6. As the case is important, I would request the Advocate General to give his opinion.

Sd. J.R.Murandhar.
17/11

Remembrancer of Legal Affairs.

U.R. to Advicate General No. 959-Confl dated 17th November 1951.

VGP. 27-6-56

No. 18 of 1951.

18th DECEMBER 1951.

U.R. TO THE ADVOCATE GENERAL NO.
959-CONFL. dt 17th NOV. 51.

OPINION.

I am of opinion that the Belapur Company and the Gokak Company are entitled to a supply of water at the rate fixed by the agreements respectively entered into by the said companies with the then Govt of Bombay. Under art 294 of the Constitution of India these agreements are binding on the State of Bombay. It is held by the Supreme Court of U.S. that valid contracts are property and as such protected from being taken away without just compensation whether the obligor be a private individual, a municipality a State or U.S. See 78 L.Ed 1434. Under the agreements entered into with the Govt. both the companies have a right to obtain supply of water at rates fixed in their respective agreements. This right is property within the meaning of art, 19 and 31 of the constitution. If by amending s.44 of the Bombay Irrigation Act 1879 provisions of that sec. are made applicable to both these companies, notwithstanding any contract entered into with them to the contrary, this would amount to depriving both the companies of their property and they will therefore be entitled to compensation under arts 31(2).

Sd.

THE ADVOCATE GENERAL OF BOMBAY.

VGP. 27-6-56

Office of the R.L.A.

In view ~~xxkxxxxhx~~ of its importance, the Advocate General was consulted in this case. This Department U.R. No.959-Confl., dated the 17th November 1951 and a copy of the Advocate General's opinion No. 18 dated the 18th December 1951 are sent herewith.

Sd. J.R.Dhurandhar.
22/12
20

Remembrancer of Legal Affairs.

U.R. to P.W.D.No. 1060-Confl dated the 20th Dec. 1951

VGP. 27-6-56

Shri P.Y.Patil, B.A. LL.B. was appointed a Sub-Police Prosecutor in January 1947. He was a part-time Government servant and his post was temporary and non-pensionable. One of the terms (conditions) of his appointment was that his term of appointment was terminable by the District Superintendent of Police without notice as may be found administratively convenient. As there were bad report about Shri Patil his service were terminated, on a report by the District Superintendent of Police, South Satara, by the Inspector General of Police by a letter dated 14th April April 1951 which stated that his services were terminated with effect from the date of the receipt of the said Order.

Shri Patil submits that his services cannot be so terminated without giving him a reasonable opportunity of showing cause as required by Article 311(2) of the Constitution.

The Home Department wants R.L.A. to advise whether Shri Patil's case is covered by article 311 of the Constitution.

Article 311(2) applies when a civil servant is dismissed or removed or reduced in rank. Shri Patil has not been dismissed or removed or reduced in rank but his services have been terminated in accordance with the terms of his service. Article 311(2) does not apply when a prson's period of service determines inaccordance with the conditions of his service (See Jayanti Prasad vs. The State of Uttar Pradesh A.I.R. 1951 Allh 793). Therefore, Shri Patil cannot claim the protection of Article 311(2).

Sd. J.R.Dhurandhar.
19/12

Remembrancer of Legal Affairs.

U.R. to H.D.No.20301, dated the 20th December 1951.

VGP. 27-6-56.

The question raised for the R.LA.'s consideration is whether the Dangis, on conversion to Christianity, would be eligible to recieve the benefit of the Dangs Loan Fund established by Government under G.R. R.D. No.568/49 dated the 16th November 1950.

2. By G.R.R.D.No.568/49 dated the 16th November 1950, Government has established the Dangs Loans Fund and has framed rules known as the Dangs Loan Rules. These Rules have no statutory force and they are in the nature of executive orders. Rule 3 provides that the objects of the Fund are to encourage thrift to prevent indebentedness to money-lenders and to raise the standard of living of the Dangis. Expression "Dangis" is not defined in the Order or rules and presumably refers to inhabitants of the Dangs district. Rule 5 provides that the Loan may be granted from this Fund to any aboriginal permanently domiciled ~~xxxx~~ in the Dangs but to no other person. The Form No. 1 published as an accompaniment to the aforesaid G.R, however, prescribes that the applicant has to declare that he is a Hindu inhabitant. The result, therefore, is that the benefit of the Dangs Loan Fund is in effect restricted only to Hindu aboriginals of the Dangs district.

3. "Aboriginal" means indigenous existing in a land at the dawn of history or before arrival of colonists (see the Concise Oxford Dictionary) . According to Rule 5 the benefit of the Fund is intended for all the aboriginals permanently domiciled in the Dangs district. The rule does not restrict the benefit of the Fund to only aboriginals professing the Hindu faith. Nor does an aboriginal cease to be an aboriginal by mere change of religion. The language of Form I is therefore, not in accord with the intention of Government as

as expressed in Rule 5. Besides, Article 15 of the Constitution also prohibits discrimination on the ground of religion. The form of the application will, therefore, have to be suitably amende

4. In this connection it may be incidentally pointed out that whereas the concessions under the Constitution granted to the Scheduled Castes are under the Constitution (Schedules Castes) Order 1950, specifically restricted to persons professing the Hindu religion; similar concessions guaranteed under the Constitution to Schedules Tribes are not under the Constitution (Schedules Tribles) Order 1950, so restricted only to persons professing the Hindu Religion only. On this analogy also it would be advisable not to restrict the benefits of the Dangs Loan Fund to only aborigi nals professing the Hindu religion.

Sd.

Additional Secretarty to Govemment.

U.R. to R.D. No. 7152 dated the 5th May 1951.

VGP. 27-6-56.,

SVP 2117

26/7